Supreme Court, U.S.
FILED
AUG 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY & BOROUGH OF SITKA,

Petitioner,

v.

R. W. BECK AND ASSOCIATES, PAUL T. CARSON, DPIC COMPANIES, and AMERICAN MOTORISTS INSURANCE COMPANY (KEMPER GROUP),

Respondents.

Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUSAN M. WEST
ROBERTSON, MONAGLE & EASTAUGH
550 West Seventh Avenue
Suite 1200
Anchorage, Alaska 99501
(907) 277-6693

Attorneys for Respondents
R. W. BECK AND ASSOCIATES
PAUL T. CARSON, DPIC Companies, and American Motorists Insurance Company (Kemper Group)

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

32pp

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. SUMMARY OF ARGUMENT	8
III. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	9
A. PETITIONER HAS FAILED TO MEET THE REQUIREMENTS OF SUPREME COURT RULE 17.1	9
B. THE NINTH CIRCUIT COURT OF APPEALS DID NOT EXCEED ITS APPELLATE JURISDICTION BY FINDING AS A MATTER OF LAW THAT McKINLEY NICHOLAS DIED DURING THE COURSE OF A SAFETY INSPECTION	11
C. PETITIONER HAS FAILED TO DEMONSTRATE THAT THE COURT OF APPEALS DEVIATED FROM THE SUBSTANTIVE LAW OF THE FORUM STATE	13
D. COURT OF APPEALS PROPERLY APPLIED *DE NOVO* STANDARD OF REVIEW	20
IV. CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

Alabama Elec. Cooperative Inc. v. First Nat'l Bank, 684 F.2d 789, 792 (11th Cir. 1982) 23

Alyeska Pipeline Serv. Co. v. H.C. Price Co., 694 P.2d 782, 785 (Alaska 1985) 17, 19

Butner v. United States, 440 U.S. 48, 99 S. Ct. 914, 59 L.Ed. 2d 136 (1979) 22

Bartlett v. Davis Corp., 547 P.2d 800 (Kan. 1976) 19

Craig Taylor Equip. Co. v. Pettibone Corp., 659 P.2d 594, 597 (Alaska 1983) 13, 14

Earthmovers of Fairbanks, Inc. v. State, 644 P.2d 238, 240 (Alaska 1982) 14

Ellis v. Dixon, 349 U.S. 458 (1955), *reh'g denied*, 350 U.S. 855 10

In re McLinn, 739 F.2d 1395 (9th Cir. 1984) 20, 22, 23, 25

Int'l Longshoremen's & Warehousemen's Union v. Kuntz, 334 F.2d 165 (9th Cir. 1964) 12

McBain v. Pratt, 514 P.2d 823 (Alaska 1973) 6, 7, 14

Mitford v. de Lasala, 666 P.2d 1000, 1005 (Alaska 1983) 13

Morgan Guar. Trust Co. of New York v. Martin, 466 F.2d 593 (7th Cir. 1972) 12

Nat'l Bank of Alaska v. J.B. L. & K. of Alaska, Inc., 546 P.2d 579 (Alaska 1976) 14

Olympic, Inc. v. Providence Washington Ins. Co. of Alaska, 648 P.2d 1008, at 1011-1012 (Alaska 1982) 17

O'Neill Investigations v. Illinois Employer's Ins. of Wausau, 636 P.2d 1170, 1174 (Alaska 1981) 14

PPG Indus. Inc. v. Continental Heller Corp., 603 P.2d 108 (Ariz. App. 1979) 18, 19

Table of Authorities Continued

	Page
Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499, 61 S. Ct. 643, 644, 85 L.Ed. 971 (1941)	23
Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974)	12
Smith v. Government of Virgin Islands, 329 F.2d 135 (3rd Cir. 1964), *cert. denied*, 377 U.S. 979	12
United States v. Hohri, ___ U.S. ___, *107 S. Ct. 2246 (June 1, 1987)*	23, 24
United States v. McConney, 728 F.2d 1195, 1201-04 (9th Cir. 1984)	21
RULES AND REGULATIONS:	
Supreme Court Rule 17.1	8, 9, 10
Federal Local Rule 5(F)(2)	11
18 C.F.R. 12.3(b)(9)	4
AUTHORITIES:	
10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2716 at 660 (1983 ed.)	12

I. STATEMENT OF THE CASE

On January 26, 1983, respondent R. W. Beck and Associates entered into a written contract with petitioner City and Borough of Sitka (hereinafter "Sitka") for professional engineering services to be performed at the Blue Lake Dam near Sitka, Alaska. The contract envisioned that Beck would provide its services in two phases, only the first of which had been fully defined. Phase I of the contract described a safety inspection of the facility as required by the Federal Energy Regulatory Commission. Once that inspection had been completed, Beck was to identify deficiencies and potential problems requiring remedial work. Detailed specifications for correction of the various defects were to be later developed under Phase II of the contract. Beck employee Paul Carson was selected to serve as project engineer on both phases of the contract.

Because Phase I required an underwater inspection of the facility, Sitka retained an independent contractor to perform the diving portions of the inspection. On April 18, 1983, McKinley Nicholas, d/b/a Alaska Aquatic Dive Center, Inc., entered into a written agreement with Sitka to serve as the underwater diving inspection contractor on Phase I of the project.

Two days later, Mr. Nicholas died while performing the subsurface safety inspection at the Blue Lake Dam. On July 25, 1983, the Estate of McKinley Nicholas filed an action in the Superior Court for the State of Alaska against R. W. Beck and Associates, Paul T. Carson, and the City and Borough of Sitka for damages arising from the death of McKinley Nicholas.

Under a specially drafted indemnity provision of the Professional Services Agreement between Beck and Sitka, Beck's liability for safety inspection work for all damages or claims of any nature, including injury to or death of any persons, was not to exceed Beck's contract compensation fee of $28,000:

> IV.B.2. *Indemnity*—It is further agreed that although the Consulting Engineer in the rendition of its services pursuant to the provisions hereof has the legal liability of an independent engineering consultant to render said services in accordance with generally-accepted engineering practices, such liability for all damages or liabilities of any kind or nature, including but not limited to damages to the property of the Client or others and injury to or death of any persons, as a result of any act or omission of the Consulting Engineer, whether or not due to the Consulting Engineer's fault or negligence or breach of this Agreement, arising out of the projects of [sic] the entering into or performance of this Agreement, shall in no event exceed the aggregate of the compensation of the Consulting Engineer, and the Client shall and hereby does agree to indemnify, defend and hold harmless the Consulting Engineer and its agents, employees and consultants, from all claims, liabilities, losses and expenses in excess of such compensation.

Petitioner's Appendix at 40a.

On August 18, 1983, Beck tendered its defense of the state court case to defendant City and Borough

of Sitka pursuant to the special indemnity provision of the professional services agreement. The City rejected the tender of defense on September 5, 1983, and both defendants thereafter continued independent trial preparation efforts.

A trial by jury commenced in the Superior Court for the State of Alaska, First Judicial District at Sitka, on September 5, 1984. Following a trial which lasted more than two and one-half weeks, the jury returned a verdict of $3,750,000, and found the City and Borough of Sitka to be 50 percent negligent for the death of McKinley Nicholas, and Beck to be 40 percent negligent for the death. The verdict was to be reduced by the decedent's 10 percent comparative negligence for his own death. Both Sitka and Beck applied to the court for a remittitur, and on November 5, 1984, the trial judge reduced the award to $3,150,000, subject to a 10 percent reduction for comparative negligence. Costs and fees were later assessed at $362,498.06, with interest at $459,969.03. An amended judgment in the amount of $3,657,467.09 was entered on March 30, 1985.

Beck and Sitka timely filed a joint notice of appeal to the Alaska Supreme Court. Pending appeal, the Estate of McKinley Nicholas settled its judgment against Beck for the sum of $1,500,000. Beck continued to actively prosecute its claim for indemnification in the United States District Court for the District of Alaska, and moved for summary judgment against the City and Borough of Sitka on January 17, 1986. Sitka, in turn, filed two cross-motions for summary judgment, one which sought an order declaring that Sitka was not obligated to indemnify

Beck, and the other requesting an order that Beck indemnify Sitka.

On April 7, 1986, United States District Court Judge Russel Holland issued an order holding that Beck was obligated to indemnify Sitka for the full amount of the underlying judgment. Judgment in favor of Sitka was entered on April 29, 1986.

In reaching its decision, the district court held that the special indemnification provision limiting Beck's liability to the contract compensation fee was intended to address only the "horrendous risks attendant to analyzing and offering opinions as to the safety, integrity, and stability of dams such as that which is a part of the Blue Lake project." However, a careful reading of the contract reveals that, in fact, no such limitation was incorporated into the provision, nor did the district court cite any extrinsic evidence which would support such an interpretation.

Indeed, careful scrutiny of the special indemnification provision governing safety inspection work reveals no language which exculpates Beck from liability only in the event of a project emergency.[1] Although the district court held that the clause was "plainly" intended to apply only in the event of a catastrophic loss, it pointed to no express wording which gave rise to the interpretation advanced by Sitka, nor did it cite any contract negotiation discussions or other extrinsic evidence which would suggest that the parties intended such an interpretation.

---

[1] A "project emergency" refers to an impending or actual sudden release of water at the project caused by natural disaster, accident, or failure of the project works. 18 C.F.R. § 12.3(b)(9).

Significantly, the contract itself provided that insofar as the safety inspection was concerned,

> "liability for *all damages or liabilities of any kind or nature, including but not limited to* . . . injury to or death of any persons, as a result of any act or omission of the Consulting Engineer, *whether or not due to the Consulting Engineer's fault or negligence or breach of this agreement* . . . shall in no event exceed the aggregate of the compensation of the Consulting Engineer. . . ."

Petitioner's Appendix at 40a (emphasis added). The above-cited limitation of liability clause is broadly worded, and is devoid of any language which suggests that indemnification should occur only in the event of a "project emergency".

Additionally, the district court failed to distinguish that overwhelming body of extrinsic evidence in which Beck personnel repeatedly explained that the special indemnity provision served not only to protect Beck from losses stemming from a catastrophic failure of the dam, but also to protect Beck from injuries to non-Beck personnel at the project site. This potential source of liability was deemed significant enough to warrant a separate provision relieving Beck of liability for worksite injuries to persons not employed by, nor in a contractual relationship with, R. W. Beck and Associates:

> III.H. Contractor's Performance and Safety *The Consulting Engineer shall not be responsible: for safety on the Client's premises or project site,* except for the safety of personnel of the Consulting Engineer, its Special

> Consultants and Subcontractors; *for providing or assuring a safe place for the performance of the contractor's work; for safety precautions, programs or equipment*; for construction means, methods, techniques, sequences or procedures; nor for contractor's failure to perform the work in accordance with the Contract Documents.

Petitioner's Appendix at 36a-37a (emphasis added.)

If, as the district court concluded, the parties were concerned with Beck's potential liability only in the event of a catastrophic failure of the dam, and not with injuries to persons such as McKinley Nicholas, then the above-cited provision becomes meaningless. Because Alaska law requires that a contract should be construed so as to give effect to every provision of the agreement, the district court's interpretation of the contract ignored governing rules of construction. *See McBain v. Pratt*, 514 P.2d 823 (Alaska 1973).

Finally, in concluding that Sitka is entitled to indemnification from Beck, the district court relied upon a standard provision included in many of the contracts drafted by Beck, which provides that:

> III.F.Liability
>
> 1. The Consulting Engineer [Beck] shall defend, indemnify and hold harmless the Client [Sitka] and its governing board, officers, agents, employees and servants from all sums for which it is finally determined that the Consulting Engineer has legal liability to other than the Client arising out of any acts, errors or omissions of the Consulting Engineer in fur-

> nishing services pursuant to this Agreement; provided, however, such defense, indemnification and hold harmless shall not exceed the sum of the amounts paid to or on behalf of the Consulting Engineer as the proceeds of any applicable insurance plus the deductible amount of such insurance.

Petitioner's Appendix at 35a.

The scope of the special indemnity clause of the Professional Services Agreement is expressly limited to those aspects of the contract involving the safety inspection work. By contrast, since Paragraph III.F.1 contains no language regarding the scope of work, nor does it expressly include the safety inspection work, there need not be any inconsistencies between the two clauses. Clearly, total harmony between the two provisions exists if provision IV.B.2 is read to govern all safety inspection work, while the indemnity provisions of Paragraph III.F.1 extend only to the remedial work to be performed. If the agreement is interpreted in this matter, the provisions will be mutually consistent, and no part of the contract will be rendered meaningless. *See McBain v. Pratt*, 514 P.2d 823 (Alaska 1973).

In analyzing the indemnification rights and responsibilities of Beck and Sitka, respectively, the district court tended to focus only upon those isolated provisions which appeared favorable to Sitka, but failed to distinguish those other paragraphs which went on to establish Beck's contractual right to indemnification. The interpretation embraced by the district court therefore left the references to compensation in Paragraph IV.B.2 wholly devoid of meaning or purpose,

and further undermined the contractual relevance of Paragraph III.H, which conferred upon Sitka all responsibility for the safety of non-Beck personnel at the project site. Accordingly, Beck timely appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit.

After a *de novo* review of the case, the Court of Appeals reversed the decision of the lower court, and held that Sitka was contractually obligated to defend, indemnify, and hold Beck harmless from and against all claims filed by the Estate of McKinley Nicholas. Sitka now petitions this court for a writ of certiorari to review the decision of the Court of Appeals. For the following reasons, the petition should be denied.

II. SUMMARY OF ARGUMENT

The petitioner has failed to satisfy any of the guidelines set forth in Supreme Court Rule 17.1, which describes the limited circumstances in which a petition for a writ of certiorari should be granted. Although Sitka argues that the United States Court of Appeals for the Ninth Circuit erred in making a finding of fact on an issue left undecided by the district court, the record is clear that the petitioner raised no factual disputes at the trial level, and the Court of Appeals only issued conclusions of law, not findings of fact. In addition, the petitioner has failed to point out any misapplication of governing state or federal law on the part of the Court of Appeals.

Finally, although the petitioner seeks to have this Court reverse the "*de novo*" standard of review adopted by the Ninth Circuit Court of Appeals, a careful review of recent case law will not only underscore the compelling policy arguments for such a

standard, but will further reveal that this Court has already given its tacit approval to such a standard.

Accordingly, the petition should be denied.

III. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. PETITIONER HAS FAILED TO MEET THE REQUIREMENTS OF SUPREME COURT RULE 17.1.

Supreme Court Rule 17.1 clearly provides that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Remarkably, despite this high standard of review, the petitioner has completely ignored the compelling nature of writs of certiorari.

Although the criteria set forth in Rule 17.1 neither control nor fully measure this Court's discretion, they nevertheless are indicative of the character of reasons to be considered in evaluating a writ of certiorari. None of the three categories described therein is satisfied in the matter at bar.

First, the decision of the Court of Appeals is not in conflict with the decision of any other federal court of appeals on the same matter. The petitioner has failed to cite any similar indemnification clauses which have been construed differently by other courts of appeals, nor does the instant matter contain any federal questions which have been decided in a way which conflicts with the prior holdings of either the Alaska Supreme Court or any other state court of last resort. Similarly, the record is barren of any indication that the Court of Appeals departed from the accepted and usual course of judicial proceedings, much less to such

a degree as to call for an exercise of this Court's power of supervision. See Supreme Court Rule 17.1(a).

Second, this case does not involve the decision of a federal question by any state court of last resort, so that the provisions of Rule 17.1(b) are clearly inapplicable.

Third, this case does not involve an important question of federal law which has not been, but should be, settled by this Court. The petitioner has failed either to clearly identify any such question of federal law or to state why, if such a question even exists, it should be settled by this Court. Supreme Court Rule 17.1(c). *See* discussion at Section III(D), pages 20-25 *infra*.

Finally, it is well settled that where a question was not raised in the proceedings below, it is not open on a petition for writ of certiorari. *Ellis v. Dixon*, 349 U.S. 458 (1955), *reh'g denied*, 350 U.S. 855. In the case at bar, Sitka did not challenge *de novo* review until after the Court of Appeals for the Ninth Circuit had already issued its opinion, despite the fact that Beck had summarized the governing standard of review in its opening appellate brief. Only after the Court of Appeals reversed the lower court's ruling was the established standard of review questioned in a petition for rehearing, and even then, not a single member of the Court of Appeals requested that the issue be reconsidered.

B. THE NINTH CIRCUIT COURT OF APPEALS DID NOT EXCEED ITS APPELLATE JURISDICTION BY FINDING AS A MATTER OF LAW THAT MCKINLEY NICHOLAS DIED DURING THE COURSE OF A SAFETY INSPECTION

The petitioner asserts that the Court of Appeals exceeded its appellate jurisdiction "by making a finding of fact on an issue left undecided by the district court, and therefore not properly before the Court of Appeals." Petitioner's Brief at 12. This assertion ignores the express findings of both the Court of Appeals and the district court.

First, the Ninth Circuit Court of Appeals found as a matter of *law*, not of fact, that McKinley Nicholas died during safety inspection work on the hydroelectric facility, so that the special indemnification clause was triggered. "The record establishes *as a matter of law* that the insured died while performing 'safety inspection work' as that term is used in the contract. The Special Provisions for indemnification apply." Petitioner's Appendix at 15a (emphasis added).

In the matter at bar, both parties filed cross-motions for summary judgment, and both asserted that no genuine issues of material fact remained to be tried. Despite filing an opposition to Beck's motion for summary judgment, Sitka failed to prepare any statement of genuine issues of material fact as required by Federal Local Rule 5(F)(2), causing the district court to observe that Beck's motion "is opposed by Sitka . . . on various legal but no factual issues." Petitioner's Appendix at 17a.

On appeal, the Court of Appeals was presented with an excerpt of record exceeding 600 pages in length, and containing the full documentation upon which each

party relied to assert that, as a matter of law, the decedent drowned either during the course of safety inspection work or while engaged in remedial activities.

When one party has met the standards of Rule 56(c), the reviewing court may direct the entry of summary judgment even though the district court did not act favorably upon the motion. 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2716, at 660 (1983 ed.). In fact, even assuming *arguendo*, that the district court had found a genuine issue of material fact, where, as here, the moving party has supported its motion with sufficient documentation to establish the absence of such a genuine issue, a Court of Appeals is justified in ordering summary judgment. *E.g., Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974), *cert. denied*, 419 U.S. 837; *Morgan Guar. Trust Co. of New York v. Martin*, 466 F.2d 593 (7th Cir. 1972); *Int'l Longshoremen's & Warehousemen's Union v. Kuntz*, 334 F.2d 165 (9th Cir. 1964); *Smith v. Gov't of Virgin Islands*, 329 F.2d 135 (3rd Cir. 1964), *cert. denied*, 377 U.S. 979.

The errors of the petitioner's argument are twofold. First, Sitka incorrectly asserts that the Court of Appeals issued a *de novo* finding of fact, although the issued memorandum clearly reveals otherwise. Second, the petitioner essentially argues that a reviewing court should not be vested with jurisdiction to make conclusions of law on appeal. Were this argument accepted, then parties pursuing appeals as a matter of right would enjoy only limited recourse, and might well be forced to undergo lengthy trials on remand even where the record has clearly established the absence of any genuine issues of material fact. Such a

result would do little to promote either judicial economy or the efficient administration of justice.

C. PETITIONER HAS FAILED TO DEMONSTRATE THAT THE COURT OF APPEALS DEVIATED FROM THE SUBSTANTIVE LAW OF THE FORUM STATE

The petitioner next argues that "the Ninth Circuit Court of Appeals erroneously interpreted the disputed contract because the court failed to adhere to Alaska law on contract interpretation." Petitioner's Brief at 15. This assertion is wholly devoid of merit.

Even a cursory review of the Court of Appeals' unpublished memorandum will reveal that the Ninth Circuit closely followed Alaska law in construing the Professional Services Agreement. In fact, other than a reference to a recent Ninth Circuit decision articulating the appropriate standard of review in summary judgment matters, the Court of Appeals cited only cases previously decided by the Alaska Supreme Court. Moreover, in reviewing the matter, the Court of Appeals first turned to the very case now cited by Sitka as governing the resolution of contract disputes:

> Alaska law requires that contracts be interpreted to give effect to the reasonable expectations of the parties. *See Mitford v. de Lasala*, 666 P.2d 1000, 1005 (Alaska 1983). The first place courts look to determine the "reasonable expectations" of the parties is to the plain language of the disputed contract provisions. *See Craig Taylor Equipment Co. v. Pettibone Corp.*, 659 P.2d 594, 597 (Alaska 1983). The plain language of Paragraph IV.B.2 limits Beck's obligation to the $28,000

> compensation it received from Sitka. Nothing in this broadly worded provision suggests that its limitation applies only in the event of a catastrophe. This construction of the provision is consistent with Paragraph IV.B.1.

Petitioner's Appendix at 15a; *see also* Petitioner's Brief at 16. It is absurd for Sitka to now contend that the Court of Appeals ignored Alaska law in its review of the case.

The Alaska Supreme Court has held that in ascertaining the reasonable expectations of the parties, one of the first tasks is for the court to look to the contract itself. *Craig Taylor Equip. Co. v. Pettibone Corp.*, 659 P.2d 594 (Alaska 1983). If, in light of all the circumstances, the contract appears capable of only one meaning, then the court need not go beyond the instrument itself in search of other possible constructions which either of the parties may have placed upon it. *Nat'l Bank of Alaska v. J.B.L. & K. of Alaska, Inc.*, 546 P.2d 579 (Alaska 1976).

Mere disagreement between the parties over the application of their contract terms does not necessarily create an ambiguity. Rather, an ambiguity exists only when the contract, taken as a whole, is reasonably subject to two or more different interpretations. *O'Neill Investigations v. Illinois Employer's Ins. of Wausau*, 636 P.2d 1170, 1174 (Alaska 1981). It is not the function of the court to create conflict; instead, contracts are to be construed and applied wherever possible so as to harmonize various provisions and thereby avoid conflicts. *Earthmovers of Fairbanks, Inc. v. State*, 644 P.2d 238, 240 (Alaska 1982); *McBain v. Pratt*, 514 P.2d 823, 828 (Alaska 1973).

Ironically, the petitioner assails the Court of Appeals' selection of the term "plain meaning" in its interpretation of the contract, yet applauds analogous language when used by the district court in its analysis: "There is no need to so construe Paragraph III.H. It has a *plain meaning* and purpose as to job safety duties, and is not on its face in conflict with Paragraph III.F."[2] Petitioner's Appendix at 28a.

Sitka's logical errors are manifest. If, as the petitioner asserts, a court's use of the term "plain meaning" has no place in the analysis of contracts governed by Alaska law, then the district court's interpretation is necessarily invalid. If, on the other hand, the district court's analysis should be accorded "deference", Petitioner's Brief at 21-25, then certainly the Court of Appeals should not be criticized for adopting the same terminology as that used by the district court.

---

[2] The district court continued its references to "plain meaning" or "plain intent" throughout its opinion. For example, the district court observed that:

> "*Plainly* the parties in Paragraph B.I. intended to address the horrendous risks attendant to analyzing and offering opinions as to the safety, integrity, and stability of dams such as that which is a part of the Blue Lake project." Petitioner's Appendix at 24a.
>
> "Using the rules of interpretation set out above, the *meaning* of the Professional Services Agreement is intrinsically *plain* and unambiguous." Petitioner's Appendix at 25a.
>
> "The language employed by the parties in Paragraph IV.B. manifests a *plain intent* that the special provisions have application to Beck's analysis and reports of the structural integrity of the dam and a failure to employ generally accepted engineering practices in accomplishing such analysis and rendering reports." Petitioner's Appendix at 27a.

Next, Sitka criticizes the failure of the Court of Appeals to address a contract provision requiring Beck to purchase five million dollars in insurance coverage. However, both parties thoroughly briefed the mandatory insurance clause for the Court of Appeals, and the panel of judges reviewing the case asked a number of questions regarding the issue at oral argument. Clearly, there is no evidence to suggest that the Ninth Circuit Court of Appeals either overlooked or intentionally ignored the insurance provision.

By contrast, the record before the Court of Appeals was replete with reasons why the district court's analysis vis-a-vis the mandatory insurance provision was erroneous.

First, despite the lower court's contention that Standard Provision III.E only highlighted the parties' intention to pass the burden of all accidents, however caused, to Beck's insurers, neither the contract nor any extrinsic evidence supports such a conclusion.

Standard Provision III.E of the Professional Services Agreement provides that:

> III.E. Insurance
>
> The Consulting Engineer shall maintain in effect, to the extent that such insurance is available at reasonable cost, employer's liability, professional liability, comprehensive general liability (bodily injury and property damage) and comprehensive automobile liability (bodily injury and property damage) insurance with respect to employees and vehicles of the (Consulting Engineer assigned to the prosecution of work under this Agreement in a maximum amount not less than $5,000,000 and statutory workmen's

> compensation protection. Upon written request, the Consulting Engineer will supply to the Client a description of each such insurance policy currently in effect, specifying the amount thereof. The Consulting Engineer will obtain and thereafter maintain in effect, if reasonably available, such additional insurance as may be requested by the Client, the cost of which shall be reimbursed by the Client.

Petitioner's Appendix at 34a-35a.

The Alaska Supreme Court has squarely held that "a promise to purchase insurance under which another is the named insured is not equivalent to a promise to indemnify the promisee." *Alyeska Pipeline Serv. Co. v. H.C. Price Co.*, 694 P.2d 782, 785 (Alaska 1985); *Olympic, Inc. v. Providence Washington Ins. Co. of Alaska*, 648 P.2d 1008, at 1011-1012 (Alaska 1982). The district court, not the Court of Appeals, ignored this governing state substantive law.

Second, if Sitka's position were adopted, then Special Provision IV.B.2, which requires Sitka to indemnify Beck for damages arising out of the course of safety inspection work, would be rendered absolutely meaningless. Standard Provision III.H, which relieves Beck of responsibility for the worksite safety of non-Beck personnel, would similarly be meaningless. If the district court's interpretation were correct, and if the parties did intend that Beck's insurers should bear the risk of all damages arising during the course of the project, then even the standard indemnity clause upon which the petitioner relies so heavily would become mere surplusage.

Third, the district court failed to explain how Paragraph III.E, which mandates that Beck carry insurance, either supports Sitka's claim for indemnification, or works to defeat Beck's right to indemnification. Instead, the district court's discussion of this provision was limited to the following excerpt:

> Paragraph III.E deals with insurance. By the terms of this paragraph, Beck was required to and in fact did take out liability insurance at its expense protecting against the risk of claims such as that brought by the Estate of McKinley Nicholas "in a maximum amount not less than $5 million. . . ."

Petitioner's Appendix at 19(a). Elsewhere in its in its decision, the court concluded without further explanation:

> It is abundantly clear that the parties agreed that Beck would insure losses such as that presented by the Nicholas claim up to $5 million dollars. Beck must necessarily have considered the cost of this insurance in negotiating the subject professional services agreement.

Id. at 27(a).

However, unlike mandatory insurance provisions in other construction cases, wherein the contractor procuring the insurance implicitly agrees to insure the owner for the latter's own negligence, the provision in the case at bar did not require that Sitka be named as an insured or additional insured, so that any inference of indemnification responsibilities becomes even less compelling. *See, e.g., PPG Indus., Inc. v. Continental Heller Corp.*, 603 P.2d 108 (Ariz. App.

1979); *Bartlett v. Davis Corp.*, 547 P.2d 800 (Kan. 1976).

Similarly, the Alaska Supreme Court has noted that it is sound public policy to enforce contract indemnity provisions and to promote creative and low cost insurance programs which serve to avoid lapses in coverage on large construction projects, *and to avoid giving a windfall to one party and its insurance carrier by transferring to them the benefit of insurance procured by another party for its own benefit. Alyeska Pipeline Serv. Co.*, 694 P.2d 782, at 787, n. 9 (emphasis added). Such laudable policies are defeated by the district court's ruling in the case at bar.

Nor does it follow that the mandatory insurance provision is rendered ineffectual by the contract interpretation explained by Beck and adopted by the Court of Appeals. Under the express provisions of Paragraph III.E, Beck agreed to maintain insurance for its own vehicles and employees, but the contract did not require Beck to provide coverage for Sitka's vehicles and employees. Similarly, while Beck was to maintain statutory worker's compensation protection, the agreement certainly did not require Beck to maintain Sitka's worker's compensation coverage for injuries to Sitka personnel during the course of the project.

In addition, the provision worked to protect Sitka against certain types of claims and losses, such as claims by third persons injured by Beck vehicles. In the event that Beck did not have adequate insurance coverage, the exposure of Sitka and its insurers might have been greatly increased. The mandatory insur-

ance provision thereby worked to protect Sitka against such unnecessary exposure.

D. COURT OF APPEALS PROPERLY APPLIED *DE NOVO* STANDARD OF REVIEW

As its final basis in support of its petition for certiorari, Sitka contends that due process requires the Ninth Circuit Court of Appeals to return to a "deference" standard in reviewing a district court's interpretation and application of the law of the foreign state. To support this argument, the petitioner limits its legal authority to a 1984 dissent by a member of the Ninth Circuit Court of Appeals in *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc). That dissent, however, is neither dispositive of the correct standard of review, nor does it convincingly explain why district court judges should be accorded greater "deference" on matters of state law than on matters of federal law.

By contrast, the majority holding in *In re McLinn* fully addresses why parties who appeal as a matter of right should be accorded *de novo* review.

> In our view, a decision to give less than full independent de novo review to the state law determinations of the district courts would be an abdication of our appellate responsibility. Every party is entitled to a full, considered, and impartial review of the decision of the trial court.
>
> * * *
>
> The parties are accorded independent de novo

> review of issues of law in the appellate courts, not because of any greater wisdom of appellate judges than of trial judges, but because of the structural differences between the two courts. . . . As we stated in [*United States v. McConney*, 728 F.2d 1195, 1201-04 (9th Cir. 1984)]: "Structurally, appellate courts have several advantages over trial courts in deciding questions of law. First, appellate judges are freer to concentrate on legal questions because they are not encumbered, as our trial judges, by the vital, but time-consuming, process of hearing evidence. Second, the judgment of at least three members of an appellate panel is brought to bear on every case. It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law. Thus, de novo review of questions of law, like clearly erroneous review of questions of fact, serves to minimize judicial error by assigning to the court best positioned to decide the issue the primary responsibility for doing so."

739 F.2d at 1398.

The Ninth Circuit Court of Appeals went on to explain that it had no lesser duty to the parties to make a correct, independent determination when the question is one of state, as opposed to federal, law. The policy concerns supporting the *de novo* standard apply as well to questions of state law as to matters of federal law. The appellate function is the same in each case and the same structural advantages encourage correct legal determinations. *Id.*

In the case at bar, the "deferential" standard advanced by Sitka is not based upon any particular reasoning or persuasiveness of the district court's decision, which is always entitled to careful consideration. Instead, it is based on an assumption that the district judge has some particular knowledge or experience in the field of law at issue that is to be given great weight apart from the authorities presented by the parties or articulated by the district judge. Certainly, such an assumption proves an unsound ground upon which to base appellate decisions. First, it depends upon ad hominem factors not part of the record. Second, it invites exploration of each judge's actual legal experience and training. Bringing such considerations into the decisional process is neither proper nor efficient, as it shifts the focus from the appropriate legal authorities to the biography of the individual judge. *Id.* at 1400.

In *McLinn*, the Court of Appeals for the Ninth Circuit observed that this Court has itself implicitly sanctioned the *de novo* standard of review:

> The approach of the Supreme Court becomes more apparent in the case where the district court and the Court of Appeals disagree. *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914, 59 L.Ed. 2d 136 (1979) is such a case. There the court of appeals, in a two-to-one decision, had reversed the district court on an issue of state law. The Supreme Court affirmed, stating "We decline to review the state law question." *Id.* at 57-58, 99 S. Ct. at 919. The Court thus upheld the determination of the two-judge majority on the court of appeals even though it was contrary to

> that of the district judge and the dissenting appellate judge. The words chosen by the Court are important in that they accurately indicate what the Supreme Court is doing: it is not giving weight or deference to the decision of the district court or the court of appeals, rather it is simply not reviewing the state law question that has been fully reviewed and determined by the intermediate appellate court.

739 F.2d at 1399.

Even more recently, this Court gave its tacit approval to the *de novo* standard of review adopted by the Ninth Circuit Court of Appeals in *In re McLinn*. In *United States v. Hohri*, ___ U.S. ___, 107 S. Ct. 2246, at 2253, n.6 (June 1, 1987), this Court observed that:

> There may have been a concern that Federal Circuit judges would not be familiar with questions of state tort law. But this problem is mitigated considerably by the fact that these cases are tried before local Federal District judges, who are likely to be familiar with the applicable state law. Indeed, a district judge's determination of a state law question usually is reviewed with great deference. *E.g., Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499, 61 S. Ct. 643, 644, 85 L.Ed. 971 (1941) (review by this Court); *Alabama Elec. Cooperative Inc. v. First Nat'l Bank*, 684 F.2d 789, 792 (CA11 1982) (review by a Court of Appeals). *But see In re McLinn*, 739 F.2d 1395, 1400 (CA9 1984) (en

> banc) (*de novo* review by a Court of Appeals). It is certainly not clear that a panel of the Federal Circuit would be less competent to review such determinations than a panel of a regional Court of Appeals.

Certainly, were this Court dissatisfied with the adoption of a *de novo* standard of review by one or more of the federal circuits, it could have seized an opportunity in *United States v. Hohri* to express its disapproval. It did not.

Finally, the petitioner implies that since each member of the reviewing panel resides in the state of Washington, the justices improperly turned to the law of that state, rather than Alaska, in construing the Professional Services Agreement. Not only is such a contention ill-founded, but it also unfairly assails the impartiality and integrity of each member of the reviewing panel.

Implicit in Sitka's argument is the requirement that members of the appellate panel must be residents of the state in which the district court is situated before *de novo* review is appropriate. Not only would such a requirement be logistically difficult to fulfill, but it would further demand that sparsely populated states such as Alaska be disproportionately represented on regional courts of appeals. Indeed, even if the reviewing panel consisted of at least one jurist from the original forum state, there would be no rational basis for granting greater deference to the reasoning of the district judge than to that of an appellate judge residing in the same state.

Moreover, despite the petitioner's bald assertion that *de novo* review increases the risk that state law

will be misinterpreted and misapplied, a *de novo* standard does not suggest that the reasoning and conclusions of the district court be ignored. As the Ninth Circuit Court of Appeals stated in *In re McLinn*, "the reasoning and persuasiveness of the judge's decision . . . is always entitled to careful consideration." 739 F.2d at 1400. The petitioner has failed to explain how, or even whether, the district judge's decision was disregarded by the Court of Appeals.

IV. CONCLUSION

In conclusion, Sitka has failed to satisfy any of the requirements of Supreme Court Rule 17.1, has failed to point to any misapplication of either state or federal law on the part of the Court of Appeals, and has failed to demonstrate any denial of the petitioner's rights of due process.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SUSAN M. WEST
ROBERTSON, MONAGLE &
EASTAUGH

Attorneys for Respondents
R. W. BECK AND ASSOCIATES,
PAUL T. CARSON, DPIC
Companies, and American
Motorists Insurance Company
(Kemper Group)

APPENDIX

APPENDIX

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b)When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c)When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.